STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 258286 Oakland Circuit Court
KURT ALLEN WELLHAUSEN, Defendant-Appellant.	LC No. 2004-196570-FH

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), larceny of a firearm, MCL 750.357b, unlawful use of a motor vehicle, MCL 750.414, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 7 to 40 years' imprisonment for the home invasion conviction, 2 to 20 years' imprisonment for the larceny of a firearm conviction, and 2 to 15 years' imprisonment for the unlawful use of a motor vehicle conviction, to be served consecutive to two years' imprisonment for the felony-firearm convictions (Judgment of Sentence; S, 7-8). We affirm.

I. FACTS

Defendant's convictions stem from the theft of three firearms and the unauthorized use of a vehicle belonging to defendant's uncle, Gary Dubisky, while he was traveling away from home with his wife and defendant's parents (Tr, 66-68). While Dubisky was away, two shotguns and a rifle were stolen from a bedroom of his home and his 1998 Honda CRV was driven without his permission (Tr, 67-68, 70-72). A neighbor, Ann Smith, noticed that Dubisky's CRV was gone and saw a bicycle with a small gas motor leaning against a garage wall (Tr, 78, 81). The following day, Smith saw a man riding the bicycle down Dubisky's driveway and noticed that the CRV was once again parked in the driveway (Tr, 84). Dubisky suspected that defendant may have been involved (Tr, 73, 77, 99).

While police officers were at defendant's home investigating the matter, defendant approached on a motorized bicycle (Tr, 91-93, 95, 97, 99-101). The officers took defendant into custody while defendant told his father to "beg them not to prosecute." (Tr, 93-94.) Detective Theodore Goff of the Southfield Police Department interviewed defendant on May 3, 2004 (Tr, 108-109). Defendant confessed to entering his aunt and uncle's home because he was looking

for property to exchange for drugs or to sell in order to buy drugs. He admitted entering the home through a rear window and taking three firearms. (Tr, 113-114.) He also admitted driving Dubisky's CRV (Tr, 114). Detective Goff testified regarding the details of defendant's statement at trial (Tr, 112-115).

II. MIRANDA & VOLUNTARINESS OF DEFENDANT'S STATEMENT

On appeal, defendant challenges the admission of his statement to Detective Goff as violative of his *Miranda*[1] right to remain silent. We disagree.

A. Standard of Review

When reviewing a trial court's decision on a motion to suppress a statement to police, this Court reviews the entire record de novo. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). This Court reviews a trial court's factual findings, however, for clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *Harris, supra* at 53. A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

B. Analysis

Defendant contends that the police did not "scrupulously honor" his right to remain silent in violation of *Miranda* and *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), when he was questioned a second time after invoking his right to remain silent. In *Mosley, supra* at 103, the Supreme Court recognized that an accused's right to cut off police questioning is a "critical safeguard" of *Miranda*. The Supreme Court also stated, however, that a prohibition on all further questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley, supra* at 102. Accordingly, the Supreme Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id*. at 104. See also *People v Adams*, 245 Mich App 226, 230-231; 627 NW2d 623 (2001).

This Court has stated that whether a significant period of time has passed between the renewed questioning and whether a fresh set of *Miranda* warnings are given are highly relevant factors to consider when determining if questioning may be reinitiated after an accused's invocation of his right to remain silent. *People v Slocum (On Remand)*, 219 Mich App 695, 701-702; 558 NW2d 4 (1996). This Court has also recognized, however, that the "scrupulously honored" standard set forth in *Mosley* is not susceptible to "black-and-white line drawing." *Id*. at 701. Thus, "the ultimate inquiry is whether the police have 'scrupulously honored' a defendant's assertion of the 'right to cut off questioning.'" *Id*. at 704. In *Mosley, supra* at 105-106, the Supreme Court looked to whether "the police failed to honor a decision of a person in custody to

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind."

Here a review of the record indicates that the police "scrupulously honored" defendant's invocation of his *Miranda* right to remain silent. At the *Walker*[2] hearing, the parties stipulated that Officer Keith Louden took defendant into custody on the evening of May 2, 2004, and read defendant his *Miranda* rights (M, 16). When asked if he wanted to make a statement, defendant responded that he wanted to wait until he found out what Dubisky intended do. Defendant then asked Louden what would happen if Dubisky did not want to press charges. (M, 14, 16-17.) Defendant asserted his right to remain silent at that time and Officer Louden left the room (M, 17). The following morning, approximately 12 or 14 hours later, the police approached defendant again, and after advising him of his *Miranda* rights, defendant waived his rights and provided a statement (M, 14-15).

The stipulated facts show that the police honored defendant's decision to cut off questioning on the evening of May 2, 2004. Defendant indicated that he was unsure whether he wanted to make a statement until he knew whether Dubisky intended to press charges (M, 14, 16-17). The police did not attempt to question defendant again until the following morning (M, 14). Although defendant argues that the stipulated facts were silent regarding how much time had elapsed before he was questioned, he admitted in a supplemental brief filed in the trial court that Detective Goff did not attempt to question him until 10:00 a.m. (Defendant's Supplemental Brief in Support of Motion to Suppress Statements, 2). Thus, a significant amount of time had elapsed before the renewed questioning. Moreover, Detective Goff read defendant his *Miranda* rights again before the interrogation. The police honored defendant's decision to cut off questioning and did not attempt to wear down his resistance, therefore, we conclude that the police "scrupulously honored" defendant's invocation of his right to remain silent. *Mosley, supra* at 105-106. Accordingly, the trial court did not err by denying defendant's motion to suppress his statement to the police.

III. MIRANDA & RIGHT TO COUNSEL

Defendant also argues that the trial court's failure to suppress his statement to the police was erroneous because he invoked his right to counsel on May 2, 2004, and was not provided with counsel before Detective Goff interrogated him the following morning. Again, we disagree.

A. Standard of Review

Defendant did not move to suppress his statement on this basis in the trial court therefore, this issue is not preserved for appellate review. . This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Carines, supra* at 763, 774; *Knox, supra* at 508.

B. Analysis

Defendant contends that it can be inferred that he invoked his right to counsel because he refused to sign the advice of rights form on May 2, 2004. The United States Supreme Court has held that an accused's invocation of his *Miranda* right to counsel must be unambiguous and unequivocal. *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). "[A] suspect . . . must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id*.

After reviewing the record, we conclude that defendant never unequivocally and unambiguously invoked his right to counsel. His argument that it can be inferred that he invoked his right to attorney because he refused to sign the advice of rights form lacks merit. Refusing to sign the form did not constitute an unequivocal and unambiguous assertion of the right to counsel and would not have lead a reasonable officer to understand that an attorney was requested. *Davis, supra* at 459. Accordingly, no plain error occurred.

Affirmed.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello